Issues: Group III Written Notice (Fraternization) and Termination; Hearing Date: 07/13/09; Decision Issued: 07/14/09; Agency: DOC; AHO: Cecil H. Creasey, Jr. Esq.; Case No. 9113; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 07/27/09; Reconsideration Decision issued 08/05/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 07/27/09; EDR Ruling #2010-2382 issued 09/22/09; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling received 10/01/09; DHRM Ruling issued 11/24/09; Outcome: AHO's decision affirmed; Attorney Fee Addendum issued 12/16/09.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9113

Hearing Date: July 13, 2009
Decision Issued: July 14, 2009

PROCEDURAL HISTORY

On March 3, 2009, Grievant was issued a Group III Written Notice of disciplinary action with termination. The offense was prohibited fraternization with an inmate in violation of Agency's Operating Procedure 130.1.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 5, 2009, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on June 9, 2009. The hearing was scheduled at the first date available between the parties and the hearing officer, June 29, 2009. However, because of a medical emergency within the Grievant's counsel's family, the hearing was continued to July 13, 2009. The grievance hearing was held on July 13, 2009, at the Agency's headquarters office.

Both the Grievant and the Agency submitted documents for exhibits that were, without objection from either side, admitted into the grievance record, and will be referred to as Agency's or Grievant's Exhibits, respectively. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Counsel for Grievant
No Witnesses for Grievant including Grievant
Representative for Agency
Advocate for Agency
One Witness for Agency including Representative

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

The Grievant requests rescission of the Group III Written Notice, reinstatement and back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency's Operating Procedure No. 135.1, Standards of Conduct, defines Group III offenses to include fraternization or non-professional relationships with offenders and violations of DOC Operating Procedure 130.1. The procedure defines Group I offenses to include types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed work force. Group II offenses are more severe in nature and specifically include failure to comply with applicable established written policy. Agency Exh. 4.

The Agency's Operating Procedure No. 130.1, Rules of Conduct Governing Employee Relationships with Offenders, states, in pertinent part:

> Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and offenders or families of offenders is prohibited. Associations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities may be treated as a Group III offense under the Operating Procedure 135.1, *Standards of Conduct and Performance*.

Agency Exh. 1.

The Agency's Operating Procedure No. 130.1, Rules of Conduct Governing Employee Relationships with Offenders, defines fraternization as

> The act of, or giving the appearance of, association with offenders, or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing employee personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders.

Agency Exh. 1. The same procedure prohibits fraternization, improprieties or the appearance of improprieties, or special privileges or favors not available to all persons similarly supervised, except through official channels.

The Offense

After reviewing the evidence presented and observing the demeanor of the witness, the Hearing Officer makes the following findings of fact:

The Agency employed Grievant as a warehouse supervisor at one of its facilities. The Grievant (a male) supervised female inmate warehouse workers. No other disciplinary actions or active written notices were identified as part of the Grievant's employment record.

The Agency's witness, Director of the division, testified that from an internal investigation he learned of criminal charges pending against the Grievant. The charges involved allegations of sexual conduct by the Grievant with an inmate. Other Agency employees were also identified with similar allegations of misconduct.

Upon advice of counsel, the Grievant entered into an "accord and satisfaction" with the complaining inmate witness. The accord and satisfaction was made pursuant to Va. Code § 19.2-151, and resulted in dismissal of all charges.

The Agency's witness testified that the Group III Written Notice with termination from employment was based on the internal investigation report that identified the criminal charges against the Grievant and the ultimate accord and satisfaction. The Agency's witness testified that the Grievant admitted that he engaged in the accord and satisfaction, but that the Grievant never admitted the alleged wrongdoing. Grievant's Exh. 2 and 3. No other witnesses testified for the Agency, and the internal investigation report was not introduced into evidence for the grievance hearing. The testifying witness's evidence is based necessarily on multiple levels of hearsay. Hearsay is not inadmissible *per se*, but here it amounts to nothing more than the facts to which the Grievant stipulates.

The Grievant did not testify at the grievance hearing, but through exhibits and counsel he stipulates that he settled a criminal charge by accord and satisfaction that also precluded a civil suit against him. The details of the alleged criminal act(s), including date, location, and specific factual allegations are not before this hearing officer. The Agency's witness testified that the mere act of the accord and satisfaction itself, comprised of payment of a sum of money to an inmate, alone, justified a conclusion of a prohibited relationship under Agency policy. The Agency contended that there were no mitigating factors that justified a lesser sanction for this offense.

The Agency asserts that the accord and satisfaction, comprised of payment of a certain sum of money from the Grievant to the complaining inmate, is *per se* a prohibited relationship under the Agency's Operating Procedure 130.1. At a minimum, the Agency contends that it constitutes the appearance of impropriety, which is a ground for discipline under Operating Procedure 130.1 and the applicable Standards of Conduct, Operating Procedure 135.1.

The Grievant asserts that he consistently maintained his innocence of the charges against him, and that there is no basis to conclude the accord and satisfaction may be construed as anything other than a dismissal of the charges and equivalent to an acquittal.

Va. Code § 19.2-151 provides

> When a person is in jail or under a recognizance to answer a charge of assault and battery or other misdemeanor, or has been indicted for an assault and battery or other misdemeanor for which there is a remedy by civil action, unless the offense was committed (i) by or upon any law-enforcement officer, (ii) riotously in violation of §§ 18.2-404 to 18.2-407, (iii) against a family or household member in violation of § 18.2-57.2, or (iv) with intent to commit a felony, if the person

> injured appears before the court which made the commitment or took the recognizance, or before the court in which the indictment is pending, and acknowledges in writing that he has received satisfaction for the injury, the court may, in its discretion, by an order, supersede the commitment, discharge the recognizance, or dismiss the prosecution, upon payment by the defendant of costs accrued to the Commonwealth or any of its officers.

A charge resolved by accord and satisfaction pursuant to Code § 19.2-151 takes place without a determination of guilt just as in the case of a *nolle prosequi* or other procedural dismissal. Accordingly, the dismissal occurs without any determination of guilt or imposition of penalty by judicial authority. *See, e.g., Daniel v. Commonwealth*, 268 Va. 523, 604 S.E.2d 444 (2004).

There is no evidence before this hearing officer to prove any conduct by the claimant other than the act of the accord and satisfaction itself. I am not willing to find that an accord and satisfaction, standing alone, without any evidence of underlying conduct by the Grievant, can be construed as a prohibited relationship under Operating Procedure 130.1. The accord and satisfaction does not excuse the Agency from proving the offensive conduct. To hold otherwise would require speculation or conjecture.

Without any evidence of the conduct giving genesis to the criminal charges, the hearing officer is without any basis to make a subjective determination of the merits of the allegations or the relative severity of the alleged conduct at issue. Hypothetically, the charges against the Grievant could have been completely without merit and scandalously manufactured slander against him. On the other hand, hypothetically, the Agency may have witnesses available to prove the details of a coercive or malevolent association with an inmate. However, without any evidence the hearing officer has nothing to consider for weighing the seriousness of the alleged conduct. The Agency's policy itself conditions a Group III offense for "[a]ssociations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities." Operating Procedure 130.1. As stated above, there is no evidence presented upon which the hearing officer may find that the Grievant engaged in an association with an inmate that may compromise security or undermine the effectiveness to carry out the employee's responsibilities.

For the foregoing reasons, the Agency has not borne its burden of proof in this disciplinary grievance. Because the actual merits of alleged conduct are not before the hearing officer, the issue of mitigation is rendered moot.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action and termination is **reversed**. The Agency is ordered to reinstate Grievant to his former position, or if occupied, to an objectively similar position.[1] He is awarded full back pay from which any interim earnings must be deducted (which includes unemployment compensation and other income earned or received to replace the loss of state

[1] *See Virginia Department of Taxation v. Daughtry*, 250 Va. 542, 463 S.E.2d 847 (1995).

employment). The Grievant is restored to full benefits and seniority. Grievant is further entitled to seek a reasonable attorney's fee, which cost shall be borne by the agency.[2]

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

[2] Va. Code § 2.2-3005.1.A & B.

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION DECISION OF HEARING OFFICER

In the matter of: Case No. 9113

Hearing Date:	July 13, 2009
Original Decision Issued:	July 14, 2009
Reconsideration Decision Issued:	Aug. 5, 2009

RECONSIDERATION DECISION

§ 7.2(a) of the Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, (effective August 30, 2004) provides, "A hearing officer's original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, all requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. Requests may be initiated by electronic means such as a facsimile or e-mail. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests must be provided to the other party and to the EDR Director."

A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusion is the basis for such a request. § 7.2(a)(1), Grievance Procedure Manual.

The Grievance Procedure Manual also provides, "A copy of all requests must be provided to the other party and to the EDR Director." § 7.2(a), Grievance Procedure Manual

On July 29, 2009, the hearing officer received the Agency's request for reconsideration. The request was not sent to the other party, the Grievant, as directed by § 7.2(a) of the Grievance Procedure Manual. Accordingly, upon learning of the Agency's request from the hearing officer, the Grievant objected to the request as procedurally invalid. The Grievant also responded to the substance of the Agency's request.

I can find no authority that establishes that the request for reconsideration is rendered invalid for failure to provide the other party a copy. While the grievance manual and rules direct that a copy of the request be provided to the other party, unless the Director of EDR concludes

otherwise, I find that failure to do so does not defeat the "filing" of the request for reconsideration because this provision is directory rather than mandatory. The Director of EDR has previously interpreted the time deadlines for filing requests for administrative review as directory and not mandatory. *See Virginia Dept. of Taxation v. Brailey*, No. 0972-07-2 (Va. Ct. App., January 15, 2008 (unpublished) (holding that the time requirements in the grievance procedure is directive and not mandatory). In so holding, I do not suggest that this provision for providing copies to other parties should be ignored by the parties or their representatives, and I urge all parties to pay particular attention to this directive. Without providing the other party a copy of the request, the request was an *ex parte* communication to the hearing officer—something the parties should avoid and something hearing officers are mindful of preventing or remedying.

Regardless of the requirement to provide the other party with a copy of a request for review, the directive to provide the other party a copy is consistent with what I would assume would be done without a rule, in good practice and as a matter of professional courtesy. The failure to comply with the directive, however, where the review requests are a matter of right, does not necessarily threaten the orderly administration of the grievance procedure. However, circumstances could result from such failure that may deny a party due process and an opportunity to be heard, and the failure to follow the directive, depending upon the circumstance, could render a request for review ineffective.

If this issue is presented to the Director of EDR and she, as the ultimate interpreter of grievance procedure, decides otherwise—that a party's failure to comply with the requirement to provide the other side with a copy of the request for review renders the request invalid—I must defer to such ruling.

As to the merits of the request for reconsideration, the Agency has not offered any probative newly discovered evidence. Similarly, the Agency has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for such a request. The issues raised by the Agency were considered and decided in the original decision, and the hearing officer, after conducting a *de novo* hearing, found the Agency did not present actual evidence beyond the accord and satisfaction. The nature of the alleged conduct was not presented to the hearing officer for weighing and evaluating. For this reason and the rationale expressed in the underlying decision, the hearing officer hereby denies the Agency's request for reconsideration and hereby affirms his decision that the Agency has failed to meet its burden of proving by a preponderance of the evidence that the termination of the Grievant's employment was warranted and appropriate.

The hearing officer will consider the Grievant's request for attorney's fees once properly submitted following the finality of all administrative reviews. Grievant's attorney should submit any request for attorney's fees in compliance with Rule VI(D) of the Rules for Conducting Grievance Hearings. The Agency may provide a rebuttal to the attorney's fees request.

APPEAL RIGHTS

A hearing officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

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Cecil H. Creasey, Jr.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the Department of Corrections
November 24, 2009

The agency, through its representative, has appealed the hearing officer's July 14, 2009, decision in Grievance No. 9113. While the agency did not submit its challenge within the designated timeframe after the hearing decision was issued, as per a ruling issued by the Department of Employment Dispute Resolution the agency was granted permission to enter a challenge. The agency objects to the decision on the following grounds: (1) *the hearing officer's interpretation that entering into an accord and satisfaction and paying an inmate to settle criminal charges does not in itself, constitute a violation of Agency Operating Procedure 130.1;* (2) *the AHO has indicated, [t]he accord and satisfaction does not excuse the Agency from proving the offensive conduct.* The Department of Corrections (DOC) further contends that the hearing officer is misapplying policy by requiring further proof of misconduct beyond the actual cause for termination (entering into any exchange not specifically delineated by the Commonwealth in the custodian relationship). The Department of Human Resource Management will address your concerns that the decision is inconsistent with policy. For the reason stated below, this Agency will not interfere with the application of this decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to your appeal.

FACTS

The hearing officer offered the following, in part, regarding his assessment of and decision in this case:

> The Agency employed Grievant as a warehouse supervisor at one of its facilities. The Grievant (a male) supervised female inmate warehouse workers. No other disciplinary actions or active written notices were identified as part of the Grievant's employment record. The Agency's witness, Director of the division, testified that from an internal investigation he learned of criminal charges pending against the Grievant. The charges involved allegations of sexual conduct by the

Grievant with an inmate. Other Agency employees were also identified with similar allegations of misconduct.

Upon advice of counsel, the Grievant entered into an "accord and satisfaction" with the complaining inmate witness. The accord and satisfaction was made pursuant to Va. Code § 19.2-151, and resulted in dismissal of all charges.

The Agency's witness testified that the Group III Written Notice with termination from employment was based on the internal investigation report that identified the criminal charges against the Grievant and the ultimate accord and satisfaction. The Agency's witness testified that the Grievant admitted that he engaged in the accord and satisfaction, but that the Grievant never admitted the alleged wrongdoing. Grievant's Exh. 2 and 3. No other witnesses testified for the Agency, and the internal investigation report was not introduced into evidence for the grievance hearing. The testifying witness's evidence is based necessarily on multiple levels of hearsay. Hearsay is not inadmissible *per se*, but here it amounts to nothing more than the facts to which the Grievant stipulates.

The Grievant did not testify at the grievance hearing, but through exhibits and counsel, he stipulates that he settled a criminal charge by accord and satisfaction that also precluded a civil suit against him. The details of the alleged criminal act(s), including date, location, and specific factual allegations are not before this hearing officer. The Agency's witness testified that the mere act of the accord and satisfaction itself, comprised of payment of a sum of money to an inmate, alone, justified a conclusion of a prohibited relationship under Agency policy. The Agency contended that there were no mitigating factors that justified a lesser sanction for this offense.

The Agency asserts that the accord and satisfaction, comprised of payment of a certain sum of money from the Grievant to the complaining inmate, is *per se* a prohibited relationship under the Agency's Operating Procedure 130.1. At a minimum, the Agency contends that it constitutes the appearance of impropriety, which is a ground for discipline under Operating Procedure 130.1 and the applicable Standards of Conduct, Operating Procedure 135.1.

The Grievant asserts that he consistently maintained his innocence of the charges against him, and that there is no basis to conclude the accord and satisfaction may be construed as anything other than a dismissal of the charges and equivalent to an acquittal.

Va. Code § 19.2-151 provides:

> When a person is in jail or under a recognizance to answer a charge of assault and battery or other misdemeanor, or has been indicted for an assault and battery or other misdemeanor for which there is a remedy by civil action, unless the offense was committed (i) by or upon any law-enforcement officer, (ii) riotously in violation of §§ 18.2-404 to 18.2-407, (iii) against a family or household member in violation of § 18.2-57.2, or (iv) with intent to commit a felony, if the person injured appears before the court which made the commitment

> or took the recognizance, or before the court in which the indictment is pending, and acknowledges in writing that he has received satisfaction for the injury, the court may, in its discretion, by an order, supersede the commitment, discharge the recognizance, or dismiss the prosecution, upon payment by the defendant of costs accrued to the Commonwealth or any of its officers.

A charge resolved by accord and satisfaction pursuant to Code § 19.2-151 takes place without a determination of guilt just as in the case of a *nolle prosequi* or other procedural dismissal. Accordingly, the dismissal occurs without any determination of guilt or imposition of penalty by judicial authority. *See, e.g., Daniel v. Commonwealth*, 268 Va. 523, 604 S.E.2d 444 (2004).

There is no evidence before this hearing officer to prove any conduct by the claimant other than the act of the accord and satisfaction itself. I am not willing to find that an accord and satisfaction, standing alone, without any evidence of underlying conduct by the Grievant, can be construed as a prohibited relationship under Operating Procedure 130.1. The accord and satisfaction does not excuse the Agency from proving the offensive conduct. To hold otherwise would require speculation or conjecture.

Without any evidence of the conduct giving genesis to the criminal charges, the hearing officer is without any basis to make a subjective determination of the merits of the allegations or the relative severity of the alleged conduct at issue. Hypothetically, the charges against the Grievant could have been completely without merit and scandalously manufactured slander against him. On the other hand, hypothetically, the Agency may have witnesses available to prove the details of a coercive or malevolent association with an inmate. However, without any evidence the hearing officer has nothing to consider for weighing the seriousness of the alleged conduct. The Agency's policy itself conditions a Group III offense for "[a]ssociations between staff and offenders that may compromise security, or undermine the effectiveness to carry out the employee's responsibilities." Operating Procedure 130.1. As stated above, there is no evidence presented upon which the hearing officer may find that the Grievant engaged in an association with an inmate that may compromise security or undermine the effectiveness to carry out the employee's responsibilities.

For the foregoing reasons, the Agency has not borne its burden of proof in this disciplinary grievance. Because the actual merits of alleged conduct are not before the hearing officer, the issue of mitigation is rendered moot.*

* Hearing Officer's decision, July 14, 2009, pp. 3, 4, and 5.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenges must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, the hearing officer determined that, after weighing the evidence, the agency has not borne its burden of proof in supporting this disciplinary action. Specifically, he concluded, "There is no evidence before this hearing officer to prove any conduct by the claimant other than the act of the accord and satisfaction itself. I am not willing to find that an accord and satisfaction, standing alone, without any evidence of underlying conduct by the Grievant, can be construed as a prohibited relationship under Operating Procedure 130.1. The accord and satisfaction does not excuse the Agency from proving the offensive conduct. To hold otherwise would require speculation or conjecture."

It is the opinion of this Department that the DOC's challenge represents an evidentiary issue that is beyond the purview of this Department's authority. Therefore, we cannot intervene in this matter.

Ernest G. Spratley

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ATTORNEY'S FEES ADDENDUM

In the matter of: Case No. 9113

Hearing Date:	July 13, 2009
Original Decision Issued:	July 14, 2009
Reconsideration Decision Issued:	Aug. 5, 2009
Attorney's Fees Addendum	Dec. 16, 2009

Applicable law provides that an employee who is represented by an attorney and who substantially prevails on the merits of a grievance challenging his discharge is entitled to recover reasonable attorney's fees, unless special circumstances would make an award unjust. Rules for Conducting Grievance Hearings, effective August 30, 2004 (the "Rules"), Section VI(D); Va. Code § 2.2-3005.1.A. Accordingly, a hearing officer may order relief including reasonable attorney's fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust. § 7.2(e) Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004; the Rules, Section VI(D). For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee. *Id.*

The decision rescinded the discipline and reinstated the grievant. Accordingly, the hearing officer finds that grievant substantially prevailed in this case. The hearing officer also finds that there are no special circumstances which would make an award of attorney's fees unjust and that the attorney's fees requested in the grievant's amended fee petition provided, by counsel, to the hearing officer on November 30, 2009, are reasonable and warranted. No agency response to the petition or amended fee petition, following the hearing officer's review decision, was received by the hearing officer. Upon review of the attorney hours indicated, and the issues involved in the matter, I approve 30.70 hours of attorney time billed at $120/hour.

AWARD

The grievant is awarded attorney's fees incurred from March 19, 2009 through October 12, 2009, in the amount of $3,684.00 (30.70 hours x $120.00 per hour).

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within ten (10) calendar days of its issuance, the hearing decision and its fees addendum may be

appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in § VII(B) of the Rules and may be appealed to the Circuit Court in accordance with § VII(C) of the Rules and § 7.3(a) of the Grievance Procedure Manual. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer